89-1351

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1989

No. _____

JOHN CARAMADRE,
Petitioner,

v.

THOMAS A. FULCOMER,
Superintendent, State Correctional Institution, Huntingdon, Pennsylvania and
THE HONORABLE ERNEST PREATE,
Attorney General for the Commonwealth of Pennsylvania,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should decide an important issue of federal law, as yet unreached by any federal court, determining if due process mandates a change of venue, when the only issue presented to the jury was the credibility of the Defendant versus the credibility of the Defendant's alleged coconspirators, and, for the nineteen months preceding the trial, the media presented only the alleged coconspirators version of events to the venire?

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled JOHN CARAMADRE, P9188, vs.THOMAS FULCOMER, ET AL., [JOHN CARAMADRE, Appellant, (W.D. PA. CIV. No. 89-0239)] at C.A. NO. 89-3416.

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STATEMENT OF JURISDICTION

The order of the Third Circuit Court of Appeals denying the Petitioner's Application for Certificate of Probable Cause was entered on November 21, 1989. The order is thus final with respect to the issues presented herein.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an Order on November 21, 1989, denying Petitioner's request for a certificate of probable cause. A copy of that order is contained in the appendix at pages 1a-2a. The Honorable Barron P. McCune, District Judge, United States District Court for the Western District of Pennsylvania, issued an opinion and order denying Petitioner's request for a certificate of probable cause. A copy of that opinion and order is contained in the appendix at pages 3a-4a. The Honorable Robert C. Mitchell, United States Magistrate for the United States District Court for the Western District of Pennsylvania, issued a Report and Recommendation, recommending that Petitioner's request for a certificate of probable cause be denied. A copy of that Report and Recommendation is contained in the appendix at pages 5a-21a. The Superior Court of Pennsylvania issued a memorandum opinion denying the Petitioner's direct appeal from the judgment of sentence on February 3, 1988. A copy of that opinion is contained in the appendix at pages 22a-32a. The trial court, the Honorable Caram J. Abood, issued and opinion and order denying the Petitioner's post-verdict motions. A copy of that opinion and order is contained in the appendix at pages 33a-72a. The

Superior Court of Pennsylvania issued an opinion and order in the related case Commonwealth v. Verilla, 952 PGH 86 on May 18, 1987. A copy of that opinion is contained in the appendix at pages 73a-85a.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 28, United States Code, Section 2254 provides:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a write of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the

law of the State to raise, by any available procedure, the question presented.
(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer of agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint

counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or less that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon

the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (June 25, 1948, c. 646, § 1, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105.)

Rule 22 of the Federal Rules of Appellate Procedures provides:

Rule 22. Habeas Corpus Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the

district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

STATEMENT OF THE CASE

Procedure

On January 23, 1979 an individual later identified as John Henry Clark was murdered in a tiny village in Cambria County, Pennsylvania. Clark lived in a boarding house in Altoona, Pennsylvania, and suspicion initially fell on a fellow resident of the boarding house, William McCulloch. The motive was believed to be jealously. McCulloch was tried by jury and acquitted of the murder.

On June 24, 1983, the Petitioner, John Caramadre, together with codefendants John Verilla, Tony Hugar and Vincent Caracciolo were charged in Cambria County Pennsylvania with conspiracy to commit kidnapping, conspiracy to commit murder, kidnapping and criminal homicide. The prosecution indicated that the state would seek the death penalty.

Hugar and Caracciolo became witnesses for the prosecution and entered into plea bargains. The trial of John Verilla was severed from the trial of John Caramadre. Mr. Verilla was tried on

September 19, 1984 and was found guilty on all charges. Pursuant to 42 Pa.C.S.A. § 9711, the jury continued to deliberate on the appropriate sentence for the conviction of first degree murder. On October 3, 1984, the trial court ruled the jury was hopelessly deadlocked and sentenced Verilla to life in prison.

At the time Mr. Caramadre moved to sever his trial from that of Mr. Verilla, Mr. Caramadre asked for a change of venue, citing the extraordinary pretrial publicity associated with the case. The trial court denied the motion which the Petitioner continued to raise at every opportunity throughout the proceedings.

Following Mr. Verilla's conviction, Mr. Caramadre moved for and received a continuance in his own trial in order to allow the publicity to dissipate. This motion for a continuance was granted and jury selection began March 5, 1985. Jury selection lasted 21 days and all selected jurors were sequestered immediately. On April 2, 1985 the jury returned a verdict finding Mr. Caramadre guilty of second-degree murder, as well as guilty of the remaining charges.

Timely post-verdict motions were filed on behalf of Mr. Caramadre which motions were denied by the trial court. On April 29, 1986 Mr. Caramadre was sentenced to life in prison on the homicide charge and concurrent 10-20 year sentences on the remaining charges. Mr. Caramadre then appealed to the Superior Court of Pennsylvania at No. 797 PGH 86. On February 3, 1988 the Superior Court issued an opinion and order dismissing the conspiracy and kidnapping charges, ruling that the statute of limitations had expired on those charges. The Superior Court affirmed the conviction for second-degree murder. On April 22, 1988 Mr. Caramadre then petitioned the Supreme Court of Pennsylvania for Allowance of Appeal which order was denied on September 15, 1988 without opinion.

On February 3, 1989 the Petitioner petitioned the United States District Court for the Western District of Pennsylvania for a Writ of Habeas Corpus at Civil Action No. 89-239. On May19, 1989 the Honorable Robert C. Mitchell, United States Magistrate for the Western District of Pennsylvania, issued his Report recommending that the Petitioner's

application for a certificate of probable cause be denied. The Petitioner then appealed to the United States District Court and on June 12, 1989 the Honorable Barron P. McCune, United States District Court Judge, adopted the Report and Recommendation of the Magistrate. On June 14, 1989 the Petitioner applied to the Third Circuit Court of Appeals for a certificate of probable cause, which application was denied by that Court on November 21, 1989.

This petition followed.

Facts

On January 23, 1979, Vincent Caracciolo, Preston Ryan, Joseph Martino and Marvin Wansley murdered John Henry Clark. Clark was an ex-con who had been befriended by Hugar, a former Altoona, Pennsylvania police officer. Hugar was associated with the Salvation Army and was able to obtain a job for Clark at the Army's facility in Altoona. Caracciolo pled guilty to first degree murder and cooperated with the Commonwealth, which agreed not to seek the death penalty in his case. Ryan made a similar agreement with the government. In exchange for their cooperation, Martino and Wansley received complete immunity from prosecution. Hugar pled guilty to first degree murder in exchange for life imprisonment.

The state's version of events is that Caracciolo was the first lieutenant, or enforcer, in a mob-style "family" headed by John Verilla. John Caramadre was the "consigliori" or counselor of the family. The family was alleged to have been involved in numbers, drugs and arson for hire. Mr. Verilla was alleged to have ordered Clark killed when Clark,

dissatisfied with his cut of the drug profits, threatened to go to the authorities.

There was no physical evidence linking the Petitioner to either the murder, or to any of the criminal activities admittedly committed by the government's witnesses. The sole evidence linking the Petitioner to the crimes charged was the testimony of the coconspirators. The state did not attempt to make any showing that Mr. Caramadre was the recipient of any illegal monies.

The Petitioner testified on his own behalf. Mr. Caramadre admitted a lifelong friendship with John Verilla with whom Mr. Caramadre owned a bar and restaurant. The Petitioner conceded that John Verilla had a numbers operation and had had such an operation for years. Mr. Caramadre vigorously denied the existence of any "family" or enterprise devoted to illegal activities.

Instead, Mr. Caramadre stated that the chief witness for the prosecution, Vincent Caracciolo, had had a "hero worship" relationship with John Verilla, with Caracciolo constantly trying to ingratiate himself with Mr. Verilla. Caracciolo tried to foster that relationship

by spending time at the bar owned by Mr. Verilla and Mr. Caramadre. Caracciolo had bragged to all who would listen that his family was Sicilian in origin and that he, Caracciolo was destined for great things. Both Caracciolo and Mr. Caramadre testified that it was clear to everyone that Mr. Caramadre despised Caracciolo.

All of the persons arrested who confessed to various crimes and who were claimed by the state to be foot soldiers in the "family" were employees of Caracciolo's construction business.

It was Mr. Caramadre's position that when the police began to uncover all of Caracciolo's activities, and as one by one Caracciolo's employees began to cooperate with the government, Caracciolo recognized that he was a certain candidate for the death penalty unless Caracciolo had something to trade. Caracciolo, Mr. Caramadre testified, decided to take advantage of the fact that John Verilla did run a numbers operation, and offered the government John Verilla and John Caramadre as the heads of the family in exchange for his life. The advantage to Mr. Caracciolo was obvious. The proof of the existence of the "family", the

"organization", came from the testimony of Caracciolo and his employees. There was no physical evidence, no independent witnesses who corroborated Caracciolo's version of events and Caracciolo had no contrary evidence to overcome.

Since the perpetrators admitted their complicity in the murder, the jury had only to decide whom they believed, the prosecution's witnesses, each of whom testified pursuant to a plea agreement, or the Petitioner. The jury heard the Petitioner's version of events only once, from the stand. The jury had been repeatedly exposed to the government's version of events for the nineteen months prior to the trial, including the identical testimony at Mr. Verilla's trial, and that version of events was so well-known it was the subject of comedy and satire in the area.

Of the two major newspapers serving Cambria County, the Johnstown-Tribune Democrat published 74 articles, mentioning the Petitioner by name 106 times. The other newspaper, The Altoona Mirror, published 227 articles concerning the matters for which the Petitioner was charged, mentioning the Petitioner by

name 213 times. Local television and radio news stations gave the case coverage that was co-extensive with the print medium. The Petitioner introduced evidence at trial that ninety-eight percent (98%) of the homes of Cambria County had both television and radio.

The Petitioner contended at trial, and throughout all post-conviction proceedings, that the jury had been hopelesslycontaminated by the pretrial publicity and, since credibility was the only issue, the publicity had in effect shifted the burden of proof to him, in violation of the presumption of innocence guaranteed to him by the fifth and fourteenth amendments to the Constitution of the United States.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THIS COURT SHOULD DECIDE AS A MATTER OF FEDERAL LAW WHETHER DUE PROCESS MANDATES A CHANGE OF VENUE WHEN THE ONLY ISSUE PRESENTED TO THE JURY IS THE CREDIBILITY OF THE DEFENDANT VERSUS THE CREDIBILITY OF THE PROSECUTIONS' WITNESSES AND THE MEDIA PRESENTED ONLY THE PROSECUTION'S UNCONTRADICTED VERSION OF EVENTS TO THE VENIRE IN A MASSIVE, LENGTHY FLOOD OF PUBLICITY.

Squarely presented to this Court is the issue of the appropriate accommodation between the public's right to know and a defendant's right to an impartial fact finder. This case presents a subtle, sophisticated variation of the kind of media-created circus atmosphere that mandated a reversal of conviction, such as in Rideau v. Louisiana, 373 U.S. 723 (1963) or Sheppard v. Maxwell, 384 U.S. 333 (1966). While the media is far more cognizant today of the constitutionally mandated limits fashioned by this Court

and trial courts have had the guidance of this Court's several opinions in order to fashion appropriate protection for Defendants who are arrested and tried in the glare of publicity, the issues presented by this case have not been decided by this Court and this Defendant and those similarly situated are essentially unprotected and shorn of the presumption of innocence.

For the ninteteen months prior to the trial in this action the venire of Cambria County was repeated exposed to a saturation level of publicity concerning crimes alleged to have been committed by foot soldiers obeying the orders of the Petitioner. Citizens of Cambria County, Pennsylvania were told in imterminable, repetitious detail that the "Mafia", the "mob", the sinister and fearsome "Cosa Nostra" had contaminated their way of life. Prior to any trial on the merits, and without any history of association with the alleged racketeering, the Petitioner was inextricably linked to the crimes for which he stood trial.

For the nineteen months preceding the trial the media gave saturating publicity to the prosecution's version of

events, publishing time and again the confessions of various witnesses as they testified at preliminary hearings and whose stories grew in impact and detail with each retelling. And there were endless retellings. Each time a proceeding was held, the prosecution's star witnesses once again retold the prosecution's side of events. The appalling, unusually gruesome details of the crimes to which the prosecution witnesses confessed were retold in often clinical detail by media which rarely had the chance to exploit such fascinating events. The publicity was so frequent and events so familiar to the public at large that the media made the brutal murder of Clark the subject of tasteless jokes.

Mr. Caramadre was linked to the murder of John Henry Clark by a conspiracy theory only. There was no physicial evidence. There was no trail of money leading to his door, there were no witnesses who saw him or heard him do anything he was accused of by the state. Nevertheless, the media's one-sided accounts were unchallenged, and cannot have failed to have established as fact in the minds of the venire, prior to any trial,

the existence of the "Mafia" and Mr. Caramadre's role in it.

The voir dire established the following statistics. Of the 177 venire persons interviewed, 90 were questioned concerning pretrial publicity[1]. Of those 90, 81 answered that they had been exposed to the publicity. Of those 81, 29 persons remembered the case from both newspaper and television accounts, 27 remembered the case from the newspapers alone, 13 from television alone, 3 from television and radio, 1 from all three sources and 1 from other persons.

The trial court reviewed the publicity and determined that since the publicity was factual[2], and the media was not clammoring for conviction, the defendant could not be prejudiced. The court refused to find any "talismanic" significance in the

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[1] Because Mr. Caramadre was charged with criminal homicide and because the prosecution was seeking the death penalty, those persons unable to give the death penalty were eliminated immediately and not asked concerning the publicity.

[2] The Petitioner does not dispute that the media accurately reported everything that Mr. Caracciolo stated. The Petitioner disputes that what Mr. Caracciolo stated was factual.

fact that the media continued to refer to the Petitioner as a member of a "mob" or "mafia."

But the position of the trial court, to which each reviewing court has given deference, either pursuant to state law or to the mandate contained in 28 U.S.C. § 2254 (d), begs the question. No court has considered the sustained effect that hearing only one side of the story had to have had on a venire whose members admitted pigeonholing the case as a "mafia" problem even while the jury was being selected. Had the information concerning the host of crimes the "family" was alleged to have committed come before the jury in the context of the trial, no one would have denied that reversible prejudice had contaminated the fact finder. Here, the venire was bombarded with that same sort of information for such a sustained period of time that few denied that they believed the information to be true.

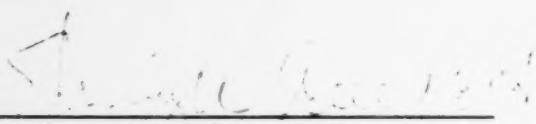
While each such juror swore that he or she was capable of setting aside any beliefs formed by virtue of exposure to publicity, the question remains why the any defendant is forced to run that gauntlet when there is a remedy available.

Unlike the situation which obtains when the Defendant is a public figure who appeared daily on nationwide television, this Defendant could have had a jury picked from a different county where the affairs of Cambria County were little known and never reported. We submit that when the danger of unfair prejudice is so patent, and the remedy so easily available the Constitution of the United States mandates that the trial court change the venue of the trial, to guarantee the Defendant an impartial factfinder.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, grant the Petitioner's application for a certificate of probable cause to determine if due process mandates a change of venue when the only issue before the fact finder is the credibility of the defendant and that credibility had been subjected to an unceasing attack in the media for an extended period of time prior to the trial on the merits.

Respectfully submitted,
GREENFIELD & ASSOCIATES



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CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
)SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 19th day of February, 1990, three (3) true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT were served on each of the individuals and in themanner indicated below, which service satisfies the requirements of Rule 28 of the Rules of the Supreme Court of the United States.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID

The Honorable Ernest Preate
Office of the Attorney General
of the Commonwealth
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Fifth Floor, Manor Building
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James Nelson, Esquire
Chief, Appellate Division
Office of the District Attorney of
Cambria County
Ebensburg, Pennsylvania

GREENFIELD & ASSOCIATES



Stanley W. Greenfield
Attorney for Petitioner
John Caramadre

SWORN TO and subscribed before me

this 19th day of February, 1990.



Notary Public

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. 89-3416

JOHN CARAMADRE, P9188

vs.

THOMAS FULCOMER, ET AL.
JOHN CARAMADRE, Appellant
(W.D. PA. CIV. No. 89-0239)

Present: BECKER, GREENBERG AND SEITZ, CIRCUIT JUDGES

Submitted is appellant's request for a certificate of probable cause pursuant to Rule 22 (b), Federal Rules of Appellate Procedure in the above-captioned case.

Respectfully,
/s/ Sally Mrvos(jg)
Clerk

The foregoing request for certificate of probable cause is denied.

By the Court,

/s/Edward R. Becker
Circuit Judge

Dated: Nov. 21, 1989

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
PENNSYLVANIA

JOHN CARAMADRE,	)
Petitioner,	)
	)
v.	)Civ.Act.No.89-239
	)
THOMAS A.	)
FULCOMER, et.al.,	)
Respondents	)

ORDER

AND NOW, this 12th day of June, 1989, after a petition for a writ of habeas corpus was filed by John Caramadre, and after the Report and Recommendation of the United States Magistrate was filed and the parties were granted ten days to file objections thereto, and upon consideration of the objections filed by the petitioner, and upon independent review of the petition and the record, from which it appears that the petitioner's allegations are without merit, and upon consideration of the Report and Recommendation of the

Magistrate which is adopted and incorporated as the opinion of this Court,

IT IS ORDERD that the petition of John Caramadre for a writ of habeas corpus is dismissed and that a certificate of probable cause is denied.

/s/ Barron P. McCune
United States District Judge

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
PENNSYLVANIA

JOHN CARAMADRE,	)
Petitioner,	)
	)
v.	)Civ.Act.No.89-239
	)
THOMAS A.	)
FULCOMER, et.al.,	)
Respondents	)

MAGISTRATE'S REPORT AND
RECOMMENDATION

I. Recommendation

It is respectfully recommended that the petition of John Caramadre for a writ of habeas corpus be dismissed and that a certificate of probable cause be denied.

II. Report

John Caramadre, by his counsel, has presented a petition for a write of habeas corpus. In a Rule and Order entered on February 7, 1989, the respondent and the District Attorney of Cambria County were

directed to answer and show cause, if any, why the relief sought should not be granted.

Caramadre is presently incarcerated at the State Correctional Institution at Huntingdon serving a life sentence following his conviction, by a jury of conspiracy to commit kidnapping, conspiracy to commit murder, kidnapping and criminal homicide at No. 577 of 1983, in the Court of Common Pleas of Cambria County, Pennsylvania. This sentence was imposed on April 29, 1986.

An appeal was taken to the Superior Court which affirmed the judgment of conviction on the murder charge and reversed the remaining convictions on the grounds that they were secured in violation of the state two year statute of limitations. Commonwealth v. Caramadre, 541 A. 2d 789 (1988, unpublished opinion filed in this Court as Document Number 9). At the same time the Court also affirmed the order of the Court of Common Pleas denying the petitioner's request to exhume the victim. Leave to appeal was denied by the Pennsylvania Supreme Court on September 15, 1988.

In support of the instant petition, Caramadre alleges he is entitled to relief for the following reasons:

The pretrial publicity concerning this case was so extensive, saturating and prejudicial that the fact finder was impermissibly contaminated and incapable of rendering a fair verdict. The failure of the trial court to grant Petitioner's repeated motion for change of venue constitutes a violation of Petitioner's right to due process which violation is fatal to the lawfulness of the conviction under which Petitioner is now held.

The trial court permitted hearsay evidence of other crimes to be admitted in Petitioner's trial under the coconspirator exception to the hearsay rule when such evidence was clearly before or beyond the scope of the conspiracy as determined by the Superior Court in Commonwealth v. Verilla, [363 Pa. Super. 386 (1987)]

Since the Petitioner was implicated in the murder on a conspiracy theory only the failure to grant an exhumation to confirm

identity was an error of constitutional dimensions.

It is provided in 28 U.S.C. §2254(b) that:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

This statute reflects a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for consideration. Preiser v. Rodriquez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Schandelmeier v. Cunningham, 819 F.2d 52 (3d Cir. 1986).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. Preiser v. Rodriquez, supra.; Gibson v. Scheidemantel, 805 F.2d 135 (3d Cir. 1986).

In the instant case, it would appear that the issues which the petitioner seeks to raise here have been presented to the appellate courts of the Commonwealth for their consideration in the first instance, and they are properly before this Court of consideration at the present time.

The facts of this case, as found by the trial court are that the petitioner and others were members of a "family" operating a "numbers" and "narcotics" ring in the Altoona area. When the victim, John Henry Clark, threatened to expose the operation a conspiracy was entered into to murder Clark which involved his being tied up, struck with a hatchet, and placed in his vehicle which was doused with gasoline and set afire.

The first basis urged for relief, is the failure of the trial court to grant the petitioner's motion for a change of venue.

As outlined in the petitioner's brief to the Superior Court, jury selection commenced on March 5, 1985 and continued until March 25, 1985:

Of the 177 venire persons interviewed, 90 were questioned concerning pretrial publicity. Of those 90, 81 or 90% answered that they had been exposed to the publicity concerning this case. Of those 81, 29 persons remembered the case from both newspaper and television accounts; 27 remembered the case from the newspapers alone; 18 from television alone, 3 from television and radio, 1 from all three sources and 1 from other persons. Combining these various figures gives the following data: 57 out of 81 persons, or approximately 63% of the venire persons asked were exposed to the information contained in the television accounts of this case. Of the actual jurors selected to serve, 12 out of 15 remembered significant details of the case as a result of pretrial publicity. Of those 12, 6 were exposed to the information contained in the daily papers and the television newscasts, 3 to the television alone and 3 to the newspapers alone.

In Patton v. Yount, 467 U.S. 1025, 1037, f.n. 12 (1984), the Court observed:

There are, of course, factual and legal questions to be considered in deciding whether a juror is qualified. The constitutional standard that a juror is impartial only if he can lay aside his opinion, and render a verdict based on the evidence presented in court is a question of federal law, see Irvin, 366 U.S.717, 723 (1961); whether a juror can in fact do that is a determination to which habeas courts owe special deference, see Rushen, 464 U.S. 114, 120 (1983). Cf. Marshall v. Lonberger, 459 U.S. 422, 431-432 (1983).

In Wainwright v. Witt, 469 U.S. 412, 423 (1985), the Court indicated that "the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of..."Thus, the Court continued, the "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424. In reaching such a determination,

"deference must be paid to the trial judge who sees and hears the juror." 469 U.S. at 426. In such instances, the trial judge's "predominant function is determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to §2254(d)." 469 U.S. at 429.

There is no doubt that during the time between the commission of the crime on January 23, 1979 and the commencement of jury selection in the petitioner's case on March 5, 1985, six years later, extensive publicity surrounding the crime as well as the trial of petitioner's codefendant was carried by the news media.[1]

The very extensive individual voir dire examination commenced on March 5, 1985 and continued until March 25, 1985, during which time 177 prospective jurors were questioned.

In considering the change of venue issue, in post-trial motions, the trial court concluded:

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[1] See: Vols. I and II of the reproduced record filed in the Superior Court by the petitioner.

the court notes for the record that a review of the newspaper articles submitted on behalf of the defendant reveals that there were no confessions, admissions, or reenactments of the crime reportedly made by the defendant, and that but for a few articles, little publicity was derived from police or prosecuting officer reports.

As to the defendant's contention that the pre-trial publicity was sensational and inflammatory, the defendant argues that references to organized crime, the mob, that the defendant was the "consigliere", and references to the defendant's involvement with "the family" went far beyond the strictly factual and demonstrates prejudicial publicity. The defendant further argues that "(e)ven strictly factual reporting of the investigation was sensational and inflammatory since the crimes admittedly committed by the Prosecution's chief witnesses were grisly." Defendants Brief in Support of Post-Trial Motion at 4.

Were the court to accept this latter argument, the decision as to whether to grant a change of venue would be based

not upon whether the reporting was factual and objective but instead, upon the degree of repulsion engendered by a particular crime. Admittedly, the vast majority of murders are "sensational" or "inflammatory" to an extent. That is not the question, however. The question is whether the publicity, not the crime itself, is sensational or inflammatory. Indeed, to sanction the defendant's argument, might require that a change of venue be granted on the sole basis that a defendant is charged with murder, a result clearly at odds with the required analysis necessary to determine whether pre-trial prejudice exists.

Concerning any "prejudicial" references made involving the defendant, the court notes that many of the newspaper articles submitted on the defendant's behalf fail to even mention him. Moreover, the court cannot conclude that certain words or references such as the "mob", "organized crime", or "the family", possess talismanic qualities whereby their mere appearance in print constitutes sensational and inflammatory publicity slanted towards conviction.

A review of the articles submitted on behalf of the defendant leads the court to conclude that under the facts and circumstances of this case, the reporting was both a fair and factual recounting of the events leading up to trial.

With reference to the pervasiveness of the media coverage, in the eighteen month period made reference to in the defendant's brief, there occurred considerable periods of time with little or no publicity. It must also be noted that the two newspapers primarily involved here are the Altoona Mirror and the Johnstown Tribune-Democrat. Altoona is in Blair County and Johnstown is in Cambria County. Although the homicide occurred in Cambria County, the Grant Jury investigation occurred in Blair County and the defendant is from Blair County. Consequently, the Altoona Mirror printed more articles than did the Johnstown Tribune-Democrat. This is reflected in the fact that of the compilations of newspaper articles submitted on the defendant's behalf, approximately two-thirds of them are from the Altoona Mirror. In addition,

the circulation of the Altoona Mirror in the southern part of Cambria County, the most populace area of the country, is virtually nil.

What impact the electronic media has is even more difficult to measure than the printed media and frankly can be inquired into only by voir dire.

Here, an extensive individual voir dire was conducted and although many venirepersons heard something about the case, most heard or read that a killing occurred without recollection of any great detail. There is no requirement, however, that prospective jurors be totally ignorant of the facts and issues involved. Commonwealth v. Hoss, 469 Pa. 195,200 364 A.2d 1335, 1338 (1976), citing Irvin v. Dowd, 366 U.S. 717, 722-0723, 81 S.Ct. 1639, 1642 (1961).

Those jurors selected were immediately sequestered and were not from that point on exposed to any publicity. The articles during the selection process were not exceedingly detailed regarding the whole incident.

Because there is no basis here for discounting these factual findings of the trial judge, they are entitled to a presumption of correctness. 28 U.S.C. §2254(d); Barry v. Brower, 864 F.2d of 294 (3d Cir. 1988). Accordingly, this allegation does not provide a basis for federal relief.

The second ground upon which relief is sought is the alleged failure of the trial court to bar testimony by co-conspirators which testimony was allegedly directed to matters beyond the scope of the conspiracy.

Alleged evidentiary errors do not provide a basis for federal habeas corpus relief unless they amount to deprivations of fundamental fairness. Reynolds v. Ellingsworth, 843 F. 2d 712 (3d Cir. 1988), cert. denied 109 S.Ct. 403 (1988).

In reviewing the conviction of petitioner's codefendant, the Pennsylvania Superior Court in Commonwealth v. Verilla, supra., ruled that the conspiracy terminated with the commission of the homicide. However, during the petitioner's trial, and over the objection of counsel, testimony was admitted regarding events which occurred after the murder.

We note first, that the decision of the Superior Court in Verilla, supra. was rendered after the petitioner's trial. Nevertheless, in reviewing this matter, the trial court held that the theory of the prosecution was that Clark's murder was merely a part of a larger "family" conspiracy. In that regard, evidence was introduced concerning the formation of the "family" of which the petitioner was allegedly a member, in 1976, the objectives of the "family", and the methods employed by the "family" to insure its survival. More specifically, the trial court held:

the members of "the family" conspiracy engaged in a premurder plan of calculated and ongoing criminal activities aimed at enrich "the family" and protecting "the family", which did not come apart until one by one, members of the conspiracy began cooperating with the authorities.

"The family", as a conspiracy, was not formed for the specific purpose of killing Clark, and "the family", as a conspiracy, did

not end with the death of John Henry Clark.[2]

In addition, certain of the evidence which was elicited concerned the petitioner's after the fact admission of his role in the murder.[3]

Thus, assuming without deciding that it was improper to admit this testimony, at worst it did not amount to fundamental unfairness, and does not provide a basis for federal relief.

Finally, Caramadre alleges he is entitled to relief as a result of a failure of the trial court to grant his post-trial motion to exhume the deceased for the purpose of challenging his identity. This request was based on post-trial information obtained by defense counsel that the deceased was seen during the summer of 1982, over three years after he was allegedly murdered.

In response to the petitioner's request, the trial court requested a forensic pathology report relative to the likelihood of meaningful information being gained

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2 . See: p. 18 of the Opinion of the Trial Court filed April 4, 1986.

3 See: TT. 73, Vol. 3 of 5 (March 29, 1985).

from exhumation. In that regard, the pathologist concluded:

Dental examination of the body performed without possible bias by other information reveals corroboration on 29 out of 29 possible points of comparison providing an impressively substantial basis for positive identification of the body of John Henry Clark. Comparison of x-rays of the exhumed body with x-rays made during life at Altoona Hospital could at best offer only one point for corroborative comparison. Decomposition would very probably render this comparison impossible. I am personally satisfied that identification of the remains of John Henry Clark has been confirmed by a competent and adequate Forensic Dental examination.[4]

Thus, because fundamental unfairness did not result from the denial of the request for exhumation, this evidentiary matter does not provide a basis for federal relief.

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[4] See: Report of Dr. Goldblatt, Forensic Pathologist, appended to the Order of Court dated January 6, 1987 denying exhumation.

Because the state court record supports the state court's determinations, there is no need fro an evidentiary hearing. Mayberry v. Petsock, 821 F. 2d 179 (3d Cir. 1987), cert. denied 108 S.Ct. 336 (1987). Accordingly, because the petitioner's contentions are without merit, it is recommended that the petition of John Caramadre for a writ of habeas corpus be dismissed, and that a certificate of probable cause be denied.

Respectfully submitted,

/S/ ROBERT C. MITCHELL
United States Magistrate

Dated: May 19, 1989

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00797 Pittsburgh 1986

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CARAMADRE,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Cambria County at No. 0577 of 1983, OTN B-170352-0.

* * * *

COMMONWEALTH OF PENNSYLVANIA

Vs.

JOHN CARAMADRE,

Appellant

No. 00118 Pittsburgh 1987

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Cambria County, at No. 0577 of 1983.

BEFORE: MONTEMURO, POPOVICH and HESTER, JJ.
MEMORANDUM: FILED: FEBRUARY 3, 1988

This is an appeal from the judgment of sentence for homicide,[1] kidnapping,[2] conspiracy to commit homicide[3] and conspiracy to commit kidnapping[4] by the appellant, John Caramadre. We affirm the judgment of sentence for homicide, but we vacate the judgment of sentence for kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping.

The appellant raises eight issues for our consideration. The first contends that the trial court erred in denying the appellant's motion for a change of venue because of extensive pretrial publicity which was allegedly slanted and completely saturated the community.

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1 Life imprisonment imposed at No. 0577(B) of 1983.

2 10 to 20 years imprisonment to be served concurrently to sentence imposed at No. 0577(B) of 1983.

3 10 to 20 years imprisonment to be served concurrently to sentence imposed at No. 0577(B) of 1983.

4 10 to 20 years imprisonment to be served concurrently to sentence imposed at No. 0577(B) of 1983.

Our review of the voir dire questions posed to the prospective and selected members of the jury, in conjunction with the voluminous articles appearing in the Johnstown and Altoona area newspapers, leads this Court to join in the trial court's finding, at pages 8-12 of its opinion, that the claim is without merit.

We adopt the same posture with respect to issues #2 (alleged error on the part of the trial court in admitting evidence of other crimes under co-conspirator exception to hearsay rule), #4 (alleged error on part of the trial court in not granting a mistrial when a witness' testimony of an attack upon his son could be attributed purportedly to the appellant), #7 (alleged trial court error in denying a mistrial for the prosecutor's remarks while cross-examining the appellant) and #8 (a supposed abuse of discretion by the trial court in denying the appellant's petition for exhumation), i.e., the trial court's opinion at pages 16-18, 22-24, 25-27 and the Discussion and Order dated January 6, 1987 (Record No. 5), respectively, adequately respond to the appellant's complaints. Thus, we adopt both as our own and for allocatur purposes.

The appellant's fifth assertion claims that the trial court erred in denying his motion for a mistrial when the prosecutor allegedly exceeding the bounds of his offer of proof for witness Hugar. For example, it appears that the parties had agreed that Hugar would only testify to the numbers ("gambling") operation of the organized crime group (known as "The Family") linked to the appellant, in the Commonwealth's accounting of the case, and the witness was to make no reference to "tip boards" (a form of gambling). Therefore, urges the appellant, Hugar's testimony that the appellant asked him if he (Hugar) would be capable of handling the "Family's" other gambling operations was prejudicial in that it portrayed the appellant as a "gambling kingpin" to the jury.

To start with, the trial court specifically directed that the witness not make reference to "tip boards". With this in mind, a reading of the trial transcript reveals that extensive testimony was received concerning "The Family's" involvement in the "numbers game" in Altoona. Accordingly, to hold that the witness' mention of "other gambling

operations" in this sea infested with reference to "gambling" was prejudicial to the appellant would be absurd, and, at best, is no more than harmless error. See Commonwealth v. Martinolich, 456 Pa. 136k 318 A.21d 680 (1974).

As for a second complained of remark by witness Hugar, i.e., he spoke with the appellant regarding the securement of money from the robbery of a doctor's office, we note that the initial, as well as supplemental, post-trial motions make no mention of this alleged error. Consequently, we find the matter waived. See Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979).

The sixth assignment of error attributes the trial court with impropriety in permitting subparagraph 3(b) of Commonwealth witness-Dr. Maras" plea letter to be read to the jury. The letter reads, in pertinent part, as follows:

3. Represent to the sentencing authority that Dr. Maras' cooperation should be given serious, favorable consideration by the sentencing authority for two main reasons:

(a) To encourage as a matter of public policy for others to cooperate with the

Commonwealth in its efforts to investigate and prosecute criminal activities.

(b) To provide for the physical safety of Dr. Maras by reducing the period of time during which he will be subject to retaliation in prison for his cooperation and truthful testimony.

There can be no doubt but that by his efforts on behalf of the Commonwealth, Dr. Maras would be exposing himself to considerable dangers to life and himself while he remains in prison. These risks which he will be taking to assist the Commonwealth must be basically considered and given great weight by the sentencing authority in setting this period for incarceration. Finally, it must be noted here that the determination of sentence is, of course, a matter totally within the discretion of the sentencing authority and cannot be controlled by the District Attorney's office.

Appellant's trial counsel objected to the reading of the letter. This was overruled, and justly so since it made no reference to the appellant. Further, in an abundance of caution, the trial court instructed the jury:

Now, ladies and gentlemen, regarding the reference in the letter to dangers from which Dr. Maras would be protected from in the prison, in no way are you to infer that those dangers are connected with the defendant in this case.

The reference to that in the letter was a reference to the atmosphere of prison relative to when a prisoner cooperates with the Commonwealth and has no connection to this defendant or case. All right.

Accordingly, we agree with the conclusion of the trial court on this point that a cautionary instruction to the jury that the letter "had no connection to the" appellant dispelled any prejudice that may have enured to the appellant from its reading. (See Trial Court Opinion at 24-25).

The last issue to be addressed appears as Roman numeral III in the appellant's brief. It was raised below and is, thus, subject to our review. It reads in question form:

Whether the court erred in denying Mr. Caramadre [sic] motion to dismiss the charges of kidnapping, conspiracy to kidnap and conspiracy to murder because

of the running of the applicable statute of limitations.

It is undisputed that Commonwealth of Pennsylvania vs. John M. Verilla, No. 1983-0576 is the companion case to the present one in that the appellant was labelled the "consiglieri" of Mr. Verilla and the matter was tried before the same judge on the same charges for the murder of one John Henry Clark.

As the appellant did below, John M. Verilla also filed a motion to quash charges of conspiracy to kidnap and murder, as well as kidnapping, arising out of the killing of Clark. The motion was denied. As a result, when the appellant filed an identical motion seeking to dismiss the same charges as sought dropped by Verilla, the trial court "dismissed [the motion] based upon the same reasoning set forth in the Opinion filed...in the case of Commonwealth of Pennsylvania vs. John M. Verilla, No. 1983-0576."

On appeal, a panel of this Court held, inter alia, that:

John Clark was kidnapped and murdered on January 23, 1979. A Grand Jury did not convene to consider the instant matter until October of 1981 and

this body did not issue a presentment until June of 1983. The relevant statute which provided the appropriate limitation of time read: "Except as otherwise provided, a prosecution for an offense other than murder must be commenced within two years after it is committed." 42 Pa.C.S.A § 5552(a)...Commencement is defined for purposes of this statute as "...when an indictment is found or an information...is issued, if such warrant, summons or citation is executed without unreasonable delay". 42 Pa.C.S.A. § 5552(e).

Subsection (1) [of 18 Pa.C.S.A. § 903(g)] holds that although a conspiracy is a continuing course of conduct such conduct "terminates when the crime or crimes which are its object are committed". 18Pa.C.S.A. § 903(g) (1). In the case sub judice the crimes which were the objects of the conspiracy were committed on January 23, 1978, more than two years before the prosecution of Appellant was commenced. There is no evidence in the record which would expand the scope of the conspiratorial agreement well beyond January 23, 1978, the date when its principal objective was accomplished. See:

Commonwealth v. Evans, 489 Pa. 85, 92-93, 413 A.2d 1025 (1980).

In view of the above analysis, we conclude that Appellant's convictions for kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping must be vacated since the prosecution of these actions was not timely made.

Commonwealth v. Verilla, ____Pa.Super. ____, ____, 526 A.2d 398, 401-02 (1987).

Since the facts out of which the charges lodged against John M. Verilla are identical to those presently facing us in the case at bar, we cannot ignore the rationale and precedential effect of the Verilla decision in its holding that the conspiracy and kidnapping charges were tried well beyond the then applicable 2-year statute of limitations.

Thus, on the strength of Verilla, we conclude that the appellant's convictions for kidnapping, conspiracy to commit murder and conspiracy to commit kidnaping must be vacated since the prosecution of these actions was untimely.

Judgment of sentence for murder of the second degree is affirmed, as well as the January 6, 1987 order of the court

below denying the appellant's petition for exhumation. However, judgment of sentence for kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping is vacated. Jurisdiction relinquished.

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. 0577-1983
VS.	:	
JOHN CARAMADRE,	:	
Defendant	:	

BEFORE THE HONORABLE CARAM J. ABOOD, JUDGE OF THE FORTY-SEVENTH JUDICIAL DISTRICT OF PENNSYLVANIA

APPEARANCES:

Counsel for Commonwealth: L. GEORGE PARRY, ESQ., JAMES A. NELSON, ESQ.

Counsel for Defendant: STANLEY W. GREENFIELD, ESQ.

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OPINION AND ORDER

The defendant, John Caramadre, was charged with Criminal Homicide, Kidnapping, Conspiracy to Commit Homicide and Conspiracy to Commit

Kidnapping. On April 2, 1985, after a trial by jury, the defendant was found guilty on all charges, although the degree of criminal homicide was found to be second degree murder.

Timely motions in arrest of judgment, or, in the alternative, for a new trial, were then filed on behalf of the defendant, and are presently before this Court for disposition.

The facts relating to the instant case reveal the following: On January 23, 1979, John Henry Clark was killed in the Mineral Point area, East Taylor Township, Cambria County, Pennsylvania. Although he was found burned in a car, an autopsy revealed that death resulted from a blow to the head and not the burning. Vincent Caracciolo admitted using a hatchet to administer the blow that killed Clark, and then setting Clark and his vehicle on fire after dousing both with gasoline. He claimed that he killed Clark at the direction of one John "Jack" Verilla and the defendant herein, John Caramadre, both of whom resided in Altoona, Blair County, Pennsylvania.

Caracciolo testified to the formation and existence of an organization called "the family" in which he, Jack Verilla, and the defendant, John Caramadre, were the original members. He testified that this organization, based in Altoona, Blair County, Pennsylvania, was headed by

Verilla and that Caramadre was the consigliere or counselor. Caracciolo characterized himself as the "enforcer" for "the family".

Various witnesses testified that "the family" was running a "numbers" operation in the Altoona area. Joseph Ruggiero testified that he ran this "numbers" operation for "the family". There was also testimony describing the cutting off of the small finger of an individual who was infringing on the "numbers" operation. It was reported to Verilla that this individual, a railroad worker from Pittsburgh by the name of Joseph McDermott, was taking bets on numbers in the Altoona area. Caracciolo testified that initially, Verilla said to give the railroader a beating and then later, changed his mind and wanted the railroader's fingers cut off. Caracciolo further testified that although he and Caramadre were initially against the idea, it was soon decided to go ahead and do it. Caracciolo then enlisted the aid of Preston Ryan, the decedent John Henry Clark, and Scott Brunner. The latter three abducted McDermott and placed him in the back of Ryan's van after hitting him on the head in the parking lot. They tied his hands behind his back, Caracciolo then met these men and while riding in the van, proceeded to warn McDermott about writing numbers. With the use of a large knife, Caracciolo chopped off one of

McDermott's fingers. Caracciolo then wrapped it in a paper towel or handkerchief and put it in his jacket pocket. McDermott was then dumped out of the van. McDermott, Caracciolo, Ryan and Brunner testified concerning this incident.

Later, the same evening, Caracciolo reported back to Verilla and exhibited the finger. Caracciolo testified that he spoke with Caramadre by phone from Verilla's residence and was complimented on a job well done.

The testimony of Dr. John F. Maras, Howard G. "Tony" Hugar, Joseph O. Martino, Marvin "Wax" Wansley, Ryan and Caracciolo recounted "the family's" involvement in a drug operation. Maras, an Altoona area physician, was assured of the protection of the organization and would write prescriptions for people sent to him. The prescriptions were filled and the pills would eventually be disposed of by the organization.

John Henry Clark, the decedent, was one of the individuals who would go to Dr. Maras and be examined and prescriptions would be written for him. Clark eventually wanted more pills for his personal use and sale, and to that end, threatened Dr. Maras. The doctor reported this to Caracciolo, who in turn, reported this to Verilla.

Subsequently, Verilla, Caracciolo and Clark met at the Station Mall in Altoona.

testified that after receiving advice from Caramadre, Caramadre offered him a choice of several hand guns he could use but that Caracciolo declined to take any of them. According to Caracciolo, Caramadre also offered money to buy new shoes because of the footprints that might be left in the snow.

Caracciolo sought the help of another associate, one Howard G. "Tony" Hugar, to set Clark up by telling him that Caracciolo had a deal coming down and that he needed Clark's help. Caracciolo also arranged for Ryan, Martino and Wansley to accompany him. Clark was sent to Caracciolo's place by Hugar.

Clark came in his car and together with Ryan's car, the group proceeded out of Blair County and into Cambria County. Then eventually stopped along a rural roadway in East Taylor Township, Cambria County. Clark was eventually tied up in his car and a bag or piece of cloth was put over his head. Caracciolo then plunged a hatchet into the head of Clark. Thereafter, both Clark and his vehicle were doused with gasoline and set afire.

Upon their returning to Altoona, Caracciolo gave the other three accomplices money for their clothes and shoes, and told them to meet Verilla, Caramadre, and himself at J's Bar the next day. That evening, Caracciolo went to Verilla's house

and again spoke with Caramadre by phone who complimented him on a good job.

They all met the following morning at J's Bar. Caracciolo testified that Caramadre reimbursed him for the money he head given the other three for shoes and clothes. A sales receipt from Dave's Saddle Shop, located in Altoona, was introduced to show the purchase of three pairs of shoes on January 24, 1979.

Caracciolo then testified that sometime in the Spring of 1980, he, Verilla, Caramadre, and Martino met at J's Bar. While there, Caramadre said that Wansley, who was in jail at the time, would have to be killed since Wansley was talking to the police about Clark's murder, the fingers, and the drugs. Martino also testified to this incident. Also, around this time, Caracciolo met with Hugar for the purpose of planning an alibi.

Dr. Maras testified to a meeting which occurred in June, 1979, at a restaurant. He, his wife, Verilla, Caramadre and Caracciolo were present. According to Maras, they discussed his going into a partnership with the three of them involving a motel/restaurant complex. In addition, they discussed getting back into the drug business after twelve to eighteen months, so as to make money in the drug business and motel business, and that these operations would keep them together as a family.

On direct examination, the defendant denied any interest in getting into a motel business, of meeting with Dr. Maras, or of discussing any matters having to do with drugs.

On cross-examination, the defendant specifically denied meeting with Dr. Maras or discussing the motel business as a means of laying low until they could again revive the drug operation.

On rebuttal, a William K. Trimble, Jr., testified that he was a real estate agent and vaguely remembered showing the defendant the Hillcrest Motel which was up for sale. Various entries in Trimble's monthly workbook which he used for appointments and notes, indicated telephone contact with the defendant, as well as appointments for meetings in early June 1979.

One entry in particular, for June 12, 1979, referred to a couple of notes indicating that Trimble met with the defendant that day at the Hillcrest to show the property for possible sale. The witness testified that another entry for June 14, 1979, containing three words, "Call John Caramadre", represented a "follow-up", which is what the witness usually did after a showing. Still another entry, for June 18, 1979, contained the notation "NA", which the witness aid indicated there was no answer when he phoned the defendant.

Trimble testified that he was not successful in selling the Hillcrest and that he had no further contact with the defendant.

The foregoing scenario was eventually revealed as a result of Wansley and Martino turning State's evidence because they were fearful, and as a result of a police investigation and Grand Jury investigation.

DISCUSSION

The defense first contends that the court erred in denying the defendant's motion for change of venue. In support of their argument, the defense introduced at pre-trial hearings and at later stages of the proceedings, compilations of newspaper articles.

In Commonwealth v. Pursell, _____Pa.___, 495 A.2d 183 (1985), cited by the defendant, our Supreme Court again identified certain factors which are to be considered in determining the nature of pre-trial publicity, stating as follows:

Pre-trial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted towards conviction rather than factual and objective; (2) the publicity reveals the accused's prior criminal record, if any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; and (3) the publicity is

derived from police and prosecuting officer reports.

The publicity must be so extensive, sustained and pervasive without sufficient time between publication and trial for the prejudice to dissipate, that the community must be deemed to have been saturated with it.

Id.at____, 495 A.2d at 187-188, citing Commonwealth v. Romeri, 504 Pa.124, 470 A.2d 498 (1983) and Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287 (1978).

Although the defendant has failed to argue the presence of those factors previously set forth under (2) and (3), the court notes for the record that a review of the newspaper articles submitted on behalf of the defendant reveals that there were no confessions, admissions, or reenactments of the crime reportedly made by the defendant, and that but for a few articles, little publicity was derived from police or prosecuting officer reports.

As to the defendant's contention that the pre-trial publicity was sensational and inflammatory, the defendant argues that references to organized crime, the mob, that the defendant was the "consigliere", and references to the defendant's involvement with "the family" went far beyond the strictly factual and demonstrates prejudicial publicity. The defendant further argues that "(e)ven

strictly factual reporting of the investigation was sensational and inflammatory since the crimes admittedly committed by the Prosecution's chief witness were grisly." Defendant's Brief in Support of Post-Trial Motions at 4.

Were the court to accept this latter argument, the decision as to whether to grant a change of venue would be based not upon whether the reporting was factual and objective but instead, upon the degree of repulsion engendered by a particular crime. Admittedly, the vast majority of murders are "sensational" or "inflammatory" to an extent. That is not the question, however. The question is whether the publicity, not the crime itself, is sensational or inflammatory. Indeed, to sanction the defendant's argument might require that a change of venue be granted on the sole basis that a defendant is charged with murder, a result clearly at odds with the required analysis necessary to determine whether pre-trial prejudice exists.

Concerning any "prejudicial" references made involving the defendant, the court notes that many of the newspaper articles submitted on the defendant's behalf fail to even mention him. Moreover, the court cannot conclude that certain words or references such as "the mob", "organized crime", or "the family", possess talismanic qualities

whereby their mere appearance in print constitutes sensational and inflammatory publicity slanted toward conviction.

A review of the articles submitted on behalf of the defendant leads the court to conclude that under the facts and circumstances of this case, the reporting was both a fair and factual recounting of the events leading up to trial.

With reference to the pervasiveness of the media coverage, in the eighteen month period made reference to in the defendant's brief, there occurred considerable periods of time with little or no publicity. It must also be noted that the two newspapers primarily involved here are the Altoona Mirror and the Johnstown Tribune-Democrat. Altoona is in Blair County and Johnstown is in Cambria County. Although the homicide occurred in Cambria County, the Grand Jury investigation occurred in Blair County and the defendant is from Blair County. Consequently, the Altoona Mirror printed more articles than did the Johnstown Tribune-Democrat. This is reflected in the fact that of the compilations of newspaper articles submitted on the defendant's behalf, approximately two-thirds of them are from the Altoona Mirror. In addition, the circulation of the Altoona Mirror in the southern part of Cambria County, the most populace are of the county, is virtually nil.

What impact the electronic media has is even more difficult to measure than the printed media and frankly can be inquired into only by voir dire.

Here, an extensive individual voir dire was conducted and although many venirepersons heard something about the case most heard or read that a killing occurred without recollection of any great detail. There is no requirement, however, that prospective jurors be totally ignorant of the facts and issues involved. Commonwealth v. Hoss, 469 Pa. 195,200, 364 A.2d 1335, 1338 (1976), citing Irvin v. Dowd, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642 (1961).

Those jurors selected were immediately sequestered and were not from that point on exposed to any publicity. The articles during the selection process were not exceedingly detailed regarding the whole incident.

Consequently, for the reasons set forth, the defendant's first assignment of error is dismissed.

The second point briefed by the defense contends that the court erred in failing to grant the defendant's motion for a bifurcated jury.

On the day preceding the beginning of voir dire, counsel for the defendant presented a motion for trial by a bifurcated jury and provided the court with an enlightened brief. The arguments

are quite compelling. Our Supreme Court, however, has ruled on the issue. In the cases of Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984), Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984), and Commonwealth v. Morales, _____Pa._____, 494 A.2d 367 (1985), our highest Court has ruled that without showing specific prejudice, the allegation of a guilt-prone jury will not suffice. Accord, Commonwealth v. Datesman, ____Pa.Super.____, 494 A.2d 413 (1985) (citing Szuchon and Maxwell). See also, Commonwealth v. Romeri, 314 Pa.Super. 279 460 A.2d 1139 (1983), aff'd, 504 Pa. 124, 470 A.2d 498 (1983), cert. denied, _____U.S._____, 104 S.Ct. 1922, 80 L.Ed. 2d 469 (1984).

In the case at bar, the jury found the defendant guilty of second degree murder, and the penalty stage of the proceeding was not entered.

How does one determine that a particular juror is in fact guilt-prone, if not by a meticulous and extensive individual voir dire? Is someone who opposes the imposition of the death penalty inn cent-prone? Unless the facts of each case are looked at and analyzed with reference to a particular jury, these questions are practically impossible to answer in a clear and satisfactory manner. Why didn't this jury find the defendant guilty of first degree murder?

Other relevant questions are how would the trial on the penalty stage be conducted? Would there have to be an actual second trial of the case? Would the trial jury relative to guilt have to sit with the penalty phase jury to decide punishment and would the verdict have to be unanimous?

Although the defense has submitted various studies in support of their claim that "death-qualification" produces a prosecution-prone jury, our research indicates that of the many cases which have considered this argument, only one appellate court has accepted same in holding that there was a denial of constitutional rights. See, Grigsby v. Mabry, 758 F.2d 226 (8th Cir.1985), aff'g Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark. (1983), cert. granted, ____U.S.____, 106 S.Ct. 59,____L.Ed. 2d____ (1985). But see, Keeten v. Garrison, 742 F.2d 129 (4th Cir.1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858 (5th Cir. 1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); People v. Fields, 35 Ca. 3d 329, 197 Cal. Rptr. 803, 673 P.2d 680 (1983); Hovey v. Superior Court of Alameda County, 28 Cal. 3d 1, 168 Cal. Rptr. 182, 616 P.2d 130 (1980). Furthermore, the Eighth Circuit's opinion in Grigsby, cited by the defense, was a 5-4 decision.

The dissent in Grigsby criticized the conclusion reached by the majority that a defendant's sixth amendment right to a jury that reflects a representational cross-section of the community applies to petit juries as well as to venires or panels, stating that "(t)he court today thus blurs the distinction between jury panels and actual juries, in contravention of reality and legal precedent." Grigsby y v. Mabry, supra, 758 F2d at 244 (Gibson, J., dissenting).

The dissent was also critical of the majority's finding that those individuals who refuse to consider capital punishment constitute a distinctive group in the community, stating that

> (t)he court today, however, enters uncharted waters when it recognized attitudes or opinions as sufficient to create a distinctive group. Attitudes and opinions, unlike the characteristics that underlie recognized cross-sectional groups, may change rapidly, whimsically, and without objective manifestation...If a jury panel were questioned closely enough, a great many additional classes might emerge. It would be absurd, however, to suggest that the sixth amendment would prevent the exclusion for cause of each such class.

Grigsby v. Mabry, supra, 758 F.2d at 245-246 (Gibson, J.,dissenting) (footnotes omitted). See also, People v. Fields, 35 Cal.3d 329, 349, 197 Cal. Rptr. 803, 815, 673 P.2d. 680, 692 (1983), cert. denied,____U.S.____, 105 S.CT. 267, 83 L.Ed.2d 204 (1984).

The voir dire in this case was extensive and exhaustive. A fair cross-section of prospective jurors were questioned. The exercise of peremtory challenges cannot be controlled by the court. How the number of women were striken - whether for cause or peremtorily - the court has not determined precisely.

The voir dire of the jurors is the key to the selection of a fair jury and many who would be reluctant to impose the death penalty, although not opposed to it, are not stricken for cause.

In Wainwright v. Witt, ____U.S.____, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court appears to have even broadened the standard for elimination for cause beyond that as set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[2] This modified standard "for determining

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[2]This raises the question of whether the data submitted on behalf of the defendant, most of which is based on Witherspoon, will have to be re-evaluated under the broader Wainwright standard. Such a possibility suggests, at the very least, the problem of viewing such data as being final and immutable.

when a prospective juror may be excluded for cause bec ause of his or her views on capital punishment...is whether the juror's views would prevent or substantially impair the performances of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, supra, _____U.S. at _____, 105 S.Ct. at 852, 83 L.Ed.2d at 851-852 (citation and footnote omitted).

Although the court in Wainwright was not confronted with the precise issue now before this court, we find it exceedingly difficult to reconcile the defendant's position with the Wainwright decision. As stated by the court in Wainwright:

Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

Wainwright, supra, _____U.S. at _____, 105 S.Ct. at 852, 83 L.Ed.2d at 851.

The defendant's final argument in support of his motion for a befurcated jury is that death-qualification is a violation of Article I, Section 15, of the Constitution of

the Commonwealth of Pennsylvania. Article I, Section 15 provides as follows:

> No commission shall issue creating special temporary criminal tribunals to try particular individuals or particular classes of cases.

Although such an argument is certainly ingenious, the court is unable to conclude that a jury drawn from a fair cross-section of the community is transformed into a "special temporary criminal tribunal" simply because prospective jurors, irrevocably opposed to the death penalty, are excluded for cause. Such an argument requires a leap in logic this court is unwilling to take.

For the foregoing reasons, the defendant's second assignment of error is dismissed.

The defendant's third contention is that the court erred in ruling that the conspiracy in this case ran from 1976 until beyond January 23, 1979, the date of Clark's death. The defendant argues that "(t)his allowed the prosecution to paint with the broadest of brushes, using for its palette all of the crimes committed by the Prosecution's witnesses." Defendant's Brief at 8.

The Commonwealth's theory in the instant case, stated succinctly, was that the full parameters of "the family" conspiracy

included the conspiracy to murder John Henry Clark, and that "the family" conspiracy continued after the murder of John Henry Clark.

In support of its theory, the Commonwealth introduced evidence which established the following: That the conspiracy herein began with the formation of "the family" in 1976; that the primary member of "the family" were John (Jack) Verilla, John Caramadre, the defendant herein, and Vincent Caracciolo; that"the family" had multiple objectives, including a "numbers" operation conducted through Joseph Ruggiero and a drug operation conducted through Dr. John Maras, an Altoona physician; that in order to protect the "numbers" operation, Caracciolo and other "family" associates, including the decedent, John Henry Clark, abducted an individual named McDermott who was infringing on said operation, and cut off his finer; that later, Clark, wanting more drugs for his personal use and sale, threatened Dr. Maras; this led to a confrontation with Verilla and Caracciolo and Clark threatened to go to the police about the "fingers" and drugs; that fear of the police as well as retaliation from their superiors in Pittsburgh if the latter were drawn into the matter by unwanted publicity, provided the motivēs for Clark's murder; that Caracciolo killed Clark at the direction of Verilla and the defendant; and

that "the family" conspiracy and efforts aimed at protecting same continued after Clark's death.

Although the defendant quotes certain passages from Commonwealth v. Evans, 489 Pa. 85, 413 A.2d 1025 (1980), relating to the duration of a conspiracy, the circumstances and evidence presented here demonstrate much more that "mere overt acts of concealment" with which our Supreme Court in Evans was concerned with as being used by the prosecution to extend a conspiracy indefinitely. In the instant case, the members of "the family" conspiracy engaged in a pre-murder plan of calculated and ongoing criminal activities aimed at enriching "the family" and protecting "the family", which did not come apart until one by one, members of the conspiracy began cooperating with the authorities.

"The family", as a conspiracy, was not formed for the specific purpose of killing Clark, and "the family", as a conspiracy, did not end with the death of John Henry Clark. Consequently, under the facts and circumstances of this case, the defendant's third assignment of error must be dismissed.

The fourth error assigned is alleged to have occurred when co-conspirators' statements were admitted prior to the conspiracy being independently established.

scheme which was the product of the conspiracy to kill Clark.

Thus, the Court concludes that the evidence was more than adequate for the jury to infer the existence of a conspiracy, and therefore, the defendant's fourth assignment of error is dismissed.

Next, the fifth assignment of error asserts that statements made by co-conspirators that amounted to hearsay on hearsay were improperly admitted into evidence.

The example pointed out in the Defendant's Brief on page 11, relates to testimony given by Marvin Wansley of a conversation he and Joseph Martino had in jail we=here Martino tells Wansley that the defendant and Jack Verilla wanted Wansley killed. Martino and Wansley were the first to turn State's evidence.

Martino had previously testified that around March 1980, when he walked into J's Bar, he overheard Verilla, the defendant Caramadre, and Caracciolo talking about killing Wansley. N.T., Vol. 3, pp.72-73.[3] Martino testified that the defendant told him Wansley had to be killed because Wansley knew to much. Id. at 73. Martino further testified that he was arrested a short time later and while in the Blair County Jail, told Wansley about the plan to kill him, i.e., Wansley. Id. at 74. He also

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[3]Caracciolo also testified to this conversation. See, N.T.,Vol. 2-A, pp. 83-84.

told Wansley that since "they didn't leave us any way out" he was going to the police and Wansley could come along if he wanted to. Id.

Wansley later testified about this conversation with Martino, as set forth in the Defendant's Brief on page 11, and at N.T., Vol. 3-A, at 22.

In this court's opinion, Wansley's testimony showed that he had reason to be fearful and said testimony was properly admitted to reveal his motive for cooperating with the authorities and testifying against the defendant.

The defendant's fifth assignment of error, therefore, is dismissed.[4]

The defense next asserts that permitting testimony about references to the Mafia, "over the way" and "Pittsburgh connection", Kelly Mannerino and John Sebastion LaRocca was unduly prejudicial, in that the prejudicial effect of these references "was so great as to far outweigh any need the prosecution had to include the evidence." Defendant's Brief at 12.

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[4]On page 11, footnote 4 of the Defendant's Brief, it is stated that "(a)s of this writing the entire transcript has not been prepared. Counsel hereby reserves the right to expand upon this argument upon receipt of the entire transcript." Since nothing further was forthcoming, the Court has only addressed the defendant's argument with regard to the illustration set forth in his brief.

"(E)vidence to prove motive, intent, plan, design, ill will or malice is relevant in a criminal case." Commonwealth v. Gwaltney, 497 Pa. 505, 514, 442, A.2d 236, 241 (1982). Commonwealth v. Faison, 437 Pa. 432, 264, A.2d 394 (1970). Here, the Commonwealth sought to establish that one of the motives behind the Clark killing was "the family's" fear of retaliation from their "Pittsburgh connection" if Clark talked to the authorities about the "fingers" incident, and the "Pittsburgh connection" was included in the unwanted publicity. To that end, the Commonwealth introduced evidence showing the relationship of "the family" with the "Pittsburgh connection". This evidence was relevant and probative as to the motive for killing Clark and outweighed any possible prejudice to the defendant.

It is true, as the defendant contends, that Clark's threat to go to the police was also a motive. It must be noted, however, that after Clark's threat, Verilla's initial fear concerned the people "over the way" hearing about the "fingers" and the ensuing consequences should that happen. Thus, Clark's threat to go to the police engendered fear not only of the police but also of reprisals from the people "over the

way". Since these were the established motives for Clark's killing, testimony about the aforementioned references was properly admitted.

The defendant's sixth assignment of error is dismissed.

Next, the defense asserts that the Court erred in not granting a mistrial when Howard G. "Tony" Hugar, during cross-examination, made reference to an attack on his son which by implication was attributed to the defendant.

Hugar's testimony, elicited on cross-examination, was as follows:

Q. But after you pleaded guilty in connection with your pleas bargain, you began then, you sat down with the State Troopers and began to tell them what you knew about everything?

A. Right.

Q. Would that have been in January of 1984 that you began that process?

A. Yes.

Q. And you talked to them repeatedly after--

A. May 24th is when I really opened up because my son had been hit.

Q. Okay.

A. A hit and run accident where he almost lost the use of his right hand.

Q. I see.

A. Right. And I received a phone call stating next time he wouldn't miss.

Q. I see.

A. Right.

Q. Did I ask you a question that you thought that was the answer to?

A. No, but that is what I am telling you.

Q. But I didn't ask you a question to ask you that, did I?

A. No, I'm sorry if I added it.

Q. Well, I think you should be.

N.T., Vol. 1-A, pp. 90-91.

The Court respectfully disagrees with the defendant's argument that Hugar's testimony clearly implicated the defendant. On the contrary, an examination of the whole exchange between the witness and defense counsel

reveals that the only possible connection between Hugar's testimony and the defendant is the pronoun "he", spoken but once.

Nevertheless, after denying defense counsel's motion for a mistrial, the court issued the following cautionary instruction:

The Court: Now, ladies and gentlemen, you are instructed to disregard the statement made by Mr. Hugar which was not in answer to a question asked by Mr. Greenfield and I instruct you to disregard it and strike it from the record because there is absolutely nothing in this case that would connect this defendant with that incident and to permit it would be prejudicial to the defendant. If there was a direct connection, then it would have been the Commonwealth's burden and indeed their desire, I would think, to have offered it as evidence, but it was volunteered from this witness and because of that danger, I caution you to disregard it and it is stricken from the record and I would request of Mr. Hugar that he answer the questions asked by counsel.

N.T., Vol. 1-A, pp. 93-94.

In light of the testimony's ambiguity and the issuance of a cautionary instruction, the defendant's seventh assignment of error is dismissed.

The eighth assignment of error asserts that permitting the letter given to Dr. John Maras reflecting his plea bargain to be read to the jury and in particular, to Dr. Maras being given protection in prison from retaliation, was prejudicial error warranting a new trial.

The Commonwealth, when calling all the witnesses who were imprisoned as a result of the incidents giving rise to the prosecutions in this case and others, revealed initially the plea bargain made with each as a tactical move in anticipation of what cross-examination might reveal.

After the letter was admitted into evidence, and counsel for the Commonwealth began reading it to the jury, defense counsel objected on the basis that any reference in the letter to the witness being given protection while in prison was prejudicial to his client.

The court was concerned that since the exhibit was admitted and already had begun to be read, that by not reading it could bring undue attention to it. Thus, the court decided to give a cautionary instruction regarding the implications of the witness being provided protection. See, N.T., Vol. 1, p. 91.

The court's cautionary instruction was as follows:

The Court: Now, ladies and gentlemen, regarding the reference in the

letter to dangers from which Dr. Maras would be protected from in the prison, in no way are you to infer that those dangers are connected with the defendant in this case.

The reference to that in the letter was a reference to the atmosphere of prison relative to when a prisoner cooperates with the Commonwealth and has no connection to this defendant (sic) or case. All right.

N.T., Vol. 1, p. 93.

The court concludes that the cautionary instruction given was sufficient to dispel a connection between the defendant and the letter's content, and that the defendant was not prejudiced by the court's permitting the letter to be read.

The defendant's eighth assignment of error, therefore is dismissed.

The final point briefed by the defense deals with remarks made by the prosecutor while cross-examining the defendant. See, N.T., Vol.4, p.143; N.T., Vol.5a, p.16; Defendant's Brief at 16-17.

In considering the defendant's argument, the court is guided by the following well-settled principles:

(W)here the language of the district attorney is intemperate, uncalled for and improper, a new trial is not necessarily

required...The language must be such that its 'unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict.'...The effect of such remarks depends upon the atmosphere of the trial...and the proper action to be taken is within the discretion of the trial court. ...

Commonwealth v. Stoltzfus, 462 Pa. 43, 61, 337 A.2d 873, 882 (197 (citations omitted). Commonwealth v. Hoss, 469 Pa. 195, 210, 364 A.23d 1335, 1343 (1976) (quoting Stoltzfus). See also, Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984); Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90 (1982).

There was some natural antagonism between the defendant and the prosecutor. The exchange was somewhat heated. Based on the fact that the prosecutor's comments occurred during cross-examination and apparently were triggered by the witness' comment the court cannot say - as the defendant argues - that the prosecutor's remarks "were a deliberate theatrical attempt to provoke the Defendant...." Defendant's Brief at 17.

This was an adversary proceeding with both sides represented by talented counsel. It is hard to imagine after going through a long trial that at the very end,

the prosecutor would intentionally risk making the trial a nullity. This would warrant one to believe it was unintentional, although certainly unadvisable.

The cautionary instruction was given in a stern tone by the court. Said instruction was as follows:

The Court: I instruct the jury to disregard that comment entirely. It was totally unnecessary. I am denying your motion for mistrial, and I would like to proceed. Now, you may cross examine.

N.T., Vol. 5a, p. 16.

The court wishes that appeals were viewed on video tape so as to get a true feel for the trial atmosphere. How something was said and reacted to during a trial is important and to simply read the transcript is often inadequate. The attorneys throughout the trial conducted themselves very well. The court and the jury understood the exchange and the context in which it occurred. It may well have engendered more sympathy for the defendant than anything.

Thus, although the court deems such remarks as improper and certainly does not condone same, it is our opinion that the remarks did not rise to the level of "prejudic(ing) the jury, forming in their

minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." Commonwealth v. Stoltzfus, supra; Commonwealth v. Hoss, supra.

In light of the foregoing, the defendant's ninth assignment of error is dismissed.

ACCORDINGLY, THE FOLLOWING ORDER IS ENTERED:

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

No. 0577-1983

vs.

JOHN CARAMADRE,

Defendant

ORDER

AND NOW, on this 4th day of April, 1986, upon review and consideration of the record, briefs, and arguments of counsel, it is hereby Ordered and Decreed that the Motions in Arrest of Judgment, or, in the alternative, for a New Trial, filed on behalf of the Defendant, John Caramadre, are denied.

BY THE COURT:

/S/ Caram J. Abood

J

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
No. 0576(a) (b) (c) 1983

VS.

CRIMINAL DIVISION

JOHN M. VERILLA,

Defendant

BEFORE THE HONORABLE CARAM J. ABOOD,
JUDGE OF THE FORTY-SEVENTH JUDICIAL
DISTRICT OF PENNSYLVANIA

APPEARANCES:

Counsel for Commonwealth:

L. GEORGE PARRY, ESQ.
JAMES A. NELSON, ESQ.

Counsel for Defendant:

KEVIN J. ROZICH, ESQ.
RUSSELL J. HEIPLE, ESQ.

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OPINION AND ORDER

The court has before it for consideration, defendant's Motion to Quash Informations filed to No. 1983-0576 (a) Conspiracy to Kidnap and Commit Murder, and 1983-0576(c) Kidnap.

These charges arise from the January 23, 1979, death of John Henry Clark. Sometime after the discovery and identification of Clark, homicide charges were filed against Willia McCullough. At trial, a jury found Mr. McCullough not guilty. In October 1981, an investigating grand jury was impanelled in Blair County to inquire into possible racketeering ties to several unsolved crimes in the Altoona area. As a result of this investigation, grand jury presentments were issued on June 24, 1983, against the defendant in Blair County for several alleged violations of the Pennsylvania Corrupt Organization Act, 18 Pa. C.S.A. Sec. 911; and in Cambria County for his alleged involvement in the immediate case.

Defendant contends that the Commonwealth is barred from prosecuting Counts A and C of the Informations by 42 Pa. C.S.A. Sec. 5552. Important to note is the fact that the Information state that "the Commonwealth intends to toll the statute of limitations, if necessary, under the provisions of 42 Pa. C.S.A. 5552(d)." The addition of this sentence brings the Information into compliance with the rule of Commonwealth v. Bender, 251 Pa.Super.

454, 380 A.2d 868 (1977), which required the prosecution to allege in the Information an exception to the limitation of time and thereby apprise the defendant that he must defend not only against the crime itself, but also against the limitation of prosecution. Based upon these facts, the C shall address the merits of defendant's motion.

At the time John Henry Clark was killed, there existed no period of limitations for murder. 42 Pa.C.S.A. Sec. 5551 effective June 27, 1978. All other crimes had a two (2) year period of limitations, with the exception of the following crimes which had a five (5) year period of limitations: involuntary deviate sexual intercourse, arson, burglary, robbery, forgery and perjury. See, 42 Pa.C.S.A. 5552(a) (b). At the time the present action was commenced, Section 5552 extended the list of crimes to include, inter alia, Kidnapping and certain conspiracies, including conspiracy to kidnap. See, 42 Pa.C.S.A., 5552(b) (1) and (3), as amended by Act 1982, May 13, P.L. 417, No. 122 Sec. 1; and 1982, Dec. 20, P.L. 1409, No. 326, Art. II Sec. 201. However, Section 403 of Act 1982, Dec. 20, P.L. 140 No. 326, instructs us that the amendment to this section "shall apply only to causes of action which accrue after the effective date of this act"which would have been on or about February 18, 1983.

Defendant asserts that the two (2) year period of limitation on Counts A and C of the Informations began to run on January 23, 1979 and, therefore, would have expired on January 23, 19__. The Commonwealth contends that the period of limitations on the charged crimes was tolled under 42 Pa.C.S.A. 5552(d). This section provides:

Commission of offense. - An offense is committed either when every element occurs, or if a legislative purpose to prohibit a continuing course or conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated. Time starts to run on the day after the offense is committed. (emphasis added)

The crime of conspiracy has been construed to be a continuing offense. Commonwealth v. Volk, 298 PA.Super. 294, 444 A.2d 118 (1982), See also, 18 Pa. C.S.A. 991(c). Clearly, our Legislature has manifest an intent to prohibit the type of conduct which gave rise to these charges by its enactment of the Investigating Grand Jury Act, 42 Pa.C.S.A 4541 and the Pennsylvania Corrupt Organization Act, supra.

This Court would be remiss of its duties if we were to view the charged offenses through the microscope offered by

the defendant. The big picture reveals that the immediate charges resulted from the use of a device provided by the Legislature to investigate unresolved crimes (i.e. the investigating grand jury). The defendant's alleged complicity in the charged conspiracy apparently continued until the time of his arrest. The concealment of the charged offenses appears to have continued until the time when certain co-defendants began cooperating with the grand jury and the Commonwealth.

The language in 42 Pa.C.S.A. 5552(d) upon which the Commonwealth relies to toll the statute of limitation will not be construed by this Court to be mere surplusage. 1 Pa.C.S. 19(2). It indicates that where, as here, a legislative intent to provide law enforcement officials with the mechanisms necessary to unravel concealed crimes exists, that the protections provided by the Pennsylvania statute of limitations must be balanced; and not slavishly applied in the objective day-counting approach proffered by the defendant. The limitations of time found in 42 Pa.C.S.A 5552 were meant to protect an accused from the burden of defending himself against charges of long-completed misconduct. Commonwealth v. Howard, 210 Pa.Super. 284,289 A.2d 223 (1967). Although this protection characterized a substantive right, unlike the right to counsel it is not a matter of constitutional

right but of legislative grace. Commonwealth v. Foster, 111 Pa.Superior Ct. 451,170 A.691 (1934). When balanced with the legislative purpose apparent in the Investigative Grand Jury Act the limitation of time statute must yield.

ACCORDINGLY, THE FOLLOWING ORDER IS ENTERED:

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

v.

JOHN M. VERILLA,

APPELLANT

NO. 0952 PITTSBURGH 1986
NO. 1149 PITTSBURGH 1986

Appeal from the Judgment of Sentence of April 29, 1986 and the Order of June 26, 1986 in the Court of Common Pleas of Cambria County, Criminal, at No. 0576-1983.

BEFORE: BROSKY, DEL SOLE AND CERCONE, JJ.

OPINION BY DEL SOLE, J.: FILED: MAY 18, 1987

Presented before us for our review are two consolidated appeals. The appeal at No. 952 Pittsburgh 1986 is taken from the Judgment of Sentence imposed following Appellant's convictions for first degree murder, kidnapping, conspiracy to commit murder and conspiracy to commit

kidnapping. At No. 1149 Pittsburgh 1986, Appellant appeals an order which assessed him for the counsel fees and costs incurred by the County of Cambria for his court appointed representation. Because the facts and issues underlying each appeal are distinct, we will treat the appeals separately.

APPEAL AT 952 PITTSBURGH 1986

Following a jury trial, Appellant was convicted of charges associated with the kidnapping and murder of John Clark. Timely post-trial motions were filed on Appellant's behalf and a supplemental motion was later filed, all of which were denied by the trial court. Appellant was sentenced to serve a life term for his conviction of first degree murder and he received three sentences of 10-20 years incarceration for the crimes of kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping. These 10-20 year terms were all ordered to be served concurrently with Appellant's life term.

On appeal Appellant raises ten issues in his statement of questions involved.

Issue number eight, which addresses the pyschological examination of a witness was raised in a pre-trial motion but was not reasserted in Appellant's post-trial motions. Accordingly, we deem this issue

waived and decline to address its merits. Pa.R.Crim.P. Rule 1123, 42 Pa.C.S.A.; Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979).

Likewise, Appellant's issue number nine has been been properly preserved for our consideration. As recited previously, Appellant filed timely post-trial motions within ten days of October 3, 1984, the date his guilty verdict was returned.Appellant's motion included the following language: "THAT DEFENDANT reserves the right to supplement and add to the above list of Motions with additional reasons within a reasonable time following receipt of the transcribed record in this case." On November 4, 1984, Appellant filed a document entitled "Amended Motion in Arrest of Judgment". The sole reason for requesting relief contained in the amended motion was the claim Appellant now presents as issue number nine. Issue nine concerns the presentment authority of the Investigating Grand Jury and does not set forth a claim relative to Appellant's request for the transcript.

Pennsylvania Rule of Criminal Procedure 1123(a) provides in part: "If the grounds do not require a transcript neither the filing, argument, nor hearing of post-verdict motions shall be delayed for lack of transcript of the notes of testimony." (emphasis added). As a transcript was not necessary to a just

determination of Appellant's amended motion, we conclude the amended motion was not timely filed and the issue contained therein was not properly preserved for appellate review. See also: Commonwealth v. Gregory, 309 Pa. Super. 529, 455 A.2d 1210 (1983).

Turning to the remaining issues, we have determined after study of the record that the assertions of Appellant found in issues one through seven are, indeed, meritless. Moreover, we find that the able and comprehensive opinion of the distinguished Judge Caram J. Abood has carefully addressed and properly rejected each of these contentions. We only wish to expound upon the discussion presented by the trial court on issue number three.

The third claim of error submitted by Appellant alleges that defense counsel was not timely provided with the statements of Kenny Russler and, therefore, Mr. Russler should not have been permitted to testify on behalf of the Commonwealth.

The trial court properly found that the Commonwealth was not tardy in providing Appellant with Mr. Russler's name and a copy of his statement. This statement, in which Mr.. Russler implicated Appellant, was elicited from Mr. Russler only shortly before trial. Appellant's counsel conceded that the defense was provided with the information within the 24 hours, in the first day of jury selection.

Appellant argues, however, that notwithstanding this disclosure he should have been previously provided with a copy of the testimony Mr. Russler gave before the Grand Jury since such testimony was inculpatory.

We disagree with Appellant's characterization of the testimony Mr. Russler gave before the Grand Jury and find that Appellant has in no way been harmed by the Commonwealth's actions. As noted by the trial court, Appellant's counsel was provided with a copy of the Grand Jury testimony at the beginning of voir dire and Appellant's counsel did attempt to impeach Mr. Russler with the testimony he had previously given the Grand Jury. The Commonwealth reasons that since Appellant's counsel made no request for a continuance he must have had ample time to examine Mr. Russler's testimony and we concur with this logic. Further, Mr. Russler recounted at trial the testimony he gave before the Grand Jury; the substance of which was that he could not recall what happened at a meeting between Appellant, the decedent, and another party the day before the murder. We conclude that Mr. Russler's non-recollection of an event was not exculpatory and for these reasons we find further support for the trial court's rejection of Appellant's claim.

The remaining issue challenges whether Appellant's motion to quash the information on his charges of kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping should have been granted since such prosecutions were time-barred. We are constrained to agree with Appellant's contention.

John Clark was kidnapped and murdered on January 23, 1979. A Grand Jury did not convene to consider the instant matter until October of 1981 and this body did not issue a presentment until June of 1983. The relevant statute which provided the appropriate limitation of time read: "Except as otherwise provided, a prosecution for an offense other than murder must be commenced within two years after it is committed." 42 Pa.C.S.A. § 5552(a), 1976, July 9, P.L. 586, No. 412 [effective June 27, 1978] Commencement is defined for purposes of this statute as "...when an indictment is found or an information...is issued, if such warrant, summons or citation is executed without unreasonable delay". 42 Pa.C.S.A. § 5552(e).

The Commonwealth does not dispute the fact that the prosecution was not commenced in this case until more than two years after the kidnapping and murder of John Clark. However, it maintains that under 42 Pa.C.S.A. § 5552(d) the beginning of the tolling period

should not be the date of Mr. Clark's kidnapping and murder. We cannot adopt this interpretation of the statute.

42 Pa.C.S.A. § 5552(d) provides:

Commission of offense - An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated. Time starts to run on the day after the offense is committed.

The Commonwealth certified this case as one in which a continuing course of conduct appears under § 5552(d). While such a claim may have arguable merit for the two conspiracy charges, this reasoning is clearly inapplicable to the kidnapping charge. See: Commonwealth v. Volk, 298 Pa. Super. 294, 444 A.2d 1182 (1982), (where the prosecution of a conspiracy that was renewed repeatedly by fraudulently obtaining public assistance funds could be prosecuted at any time within two years after the commission of the last offense). The kidnapping herein occurred on January 23, 1978 and the statute of limitations began to run on this charge the next day.

Regarding the conspiracy charges the Cross Reference listed under § 5552 states: "Criminal conspiracy, duration of offense for purposes of subsec. (d) of this section see 18 Pa.C.S.A § 903(g)." Turning to the section to which reference was made, one finds:

Duration of conspiracy - For purposes of 42 Pa.C.S. § 5552(d) (relating to commission of offense):

(1) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and b y those with whom he conspired;

(2) such abandonment is presumed if neither the defendant nor any one with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(3) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

18 Pa.C.S.A. § 903(g).

Subsections (2) and (3) are clearly inapplicable to the instant case since the object of the conspiracy was not abandoned. Subsection (1) holds that although a conspiracy is a continuing court of conduct such conduct "terminates when the crime or crimes which are its object are committed". 18 Pa.C.S.A. § 903(g)(1). In the case sub judice the crimes which were the objects of the conspiracy were committed on January 23, 1978, more than two years before the prosecution of Appellant was commenced. There is no evidence in the record which would expand the scope of the conspiratorial agreement well beyond January 23, 1978, the date when its principal objective was accomplished. See: Commonwealth v. Evans, 489 Pa. 85, 92-93, 413 A.2d 1025 (1980).

In view of the above analysis, we conclude that Appellant's convictions for kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping must be vacated since the prosecution of these actions was not timely made.

APPEAL AT 01149 PITTSBURGH 1986

Today we determine the validity of the trial court's order assessing against

Appellant counsel fees and costs, expended by the County of Cambria, for Appellant's court-appointed representation.

The record reveals that Appellant retained private counsel after being arrested and charged with the crimes of which he was ultimately convicted. However, before trial commenced, counsel-for-Appellant filed a Motion for Leave to Withdraw Appearance as Counsel for Defendant insofar as Appellant had failed to pay the legal fees and expenses associated with his defense. Following a hearing on this issue, the trial court granted Appellant was later afforded court-appointed counsel, although the Public Defender's Office had declined to grant Appellant indigent status. Included in that Order was the provision that "the Court will make a determination as to whether or not the costs of such representation can be assessed against John Verilla". (Order of Court, 3/4/84). Subsequent to sentencing, a hearing was conducted to resolve this question. The result of this proceeding was to assess counsel fees and costs against Appellant. For the following reasons, we reverse.

Initially, we note that it was within the trial court's discretion to provide Appellant with court-appointed counsel. The source of such power originates from Pa.R.Crim.P., Rule 316(c) (i). Pursuant to subsection (c)(i), a trial judge may assign

counsel, regardless of indigency, where in his/her opinion, the interests of justice require it. See Comment to Pa.R.Crim.P., Rule 316. However, Rule 316 provides simply for the assignment of counsel; it has no provisions authorizing the court to order payment of fees.

The court, by its Order, admittedly cites no derivative authority by which it could assess counsel fees against Appellant. The record divulges that the reimbursement order was based largely upon the trial court's interpretation of In re Estate of Damario, 488 Pa. 434, 412 A.2d 842 (1980). (N.T., 6/26/86, 7). In that case, our Supreme Court upheld an Orphans' Court's decision requiring the guardian of an incompetent's estate to reimburse the Court of Berks County for costs incurred for the incompetent's defense in a murder prosecution. Id. at 412 A.2d at 845. We find Damario to be inapposite to the instant case inasmuch as it involved the exercise of a broad grant of equitable authority which was vested in the orphans' court. Id. at 412 A.2d at 844-845. Moreover, our Supreme Court distinguished the facts in Damario from those circumstances similar to the case at bar:

[w]hile there are cases which have invalidated orders for reimbursement for lack of express statutory authority,...those

orders were entered by sentencing courts and are therefore inapposite here. The case before us involves a separate civil action instituted by the county, brought before the orphans' court having broad jurisdiction over Damario's estate.

Id. at 412 A.2d at 844, n.3. Clearly Damario cannot be construed to permit assessment of counsel fees by a trial court simply because Appellant was assigned court-appointed counsel, even though he was not ruled indigent.

Notwithstanding the fact that there exists no case law addressing the precise issue presently before this Court, we draw support from those cases which required a finding of statutory authority before the trial court's order of reimbursement to a public defender's office would be upheld. See Commonwealth v. Terry, 470 Pa. 234, 368 A.2d 279 (1977); Commonwealth v. Pride, 252 Pa. Super. 34, 380 A.2d 1267 (1977); Commonwealth v. Opara, 240 Pa. Super. 511, 362 A.2d 305 (1975).

Absent an indication by our legislature sanctioning the assessment of counsel fees for court-appointed counsel, we decline to validate orders granting such relief to counties. Parenthetically we note that § 3 of the Act of January 19, 1968 P.L. 984, 19 P.S. § 793, at one time provided for the reimbursement by a criminal defendant or a relative of the defendant to

the county "for compensation and expense incurred and paid to court-appointed counsel". However, this statute has since been repealed, 1984, October 12, P.L. 959, No. 187 § 6.

Appeal at 952 Pittsburgh 1986, Judgment of Sentence for first degree murder affirmed. Judgment of Sentence for kidnapping, conspiracy to commit murder and conspiracy to commit kidnapping vacated. Jurisdiction relinquished.

Appeal at 1149 Pittsburgh 1986, order reversed. Jurisdiction relinquished.